IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

DAVID GROCHOCINSKI, not individually but solely in his capacity as the Chapter 7 Trustee for the bankruptcy estate of CMGT, INC.,	)	
Plaintiff,	)	No. 06 C 5486
v.	)	Judge Virginia M. Kendall
MAYER BROWN ROWE & MAW LLP and RONALD B. GIVEN,	)	Magistrate Judge Morton Denlow
Defendants.	)	

REPLY TO PLAINTIFF'S RULE 56.1(b)(3)(C) STATEMENT IN SUPPORT OF HIS RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants "Mayer Brown" and Ronald B. Given ("Ronald") (collectively, "Defendants"), by their attorneys, Novack and Macey LLP, pursuant to Local Rule 56.1(a), submit this Reply to Plaintiff's Local Rule 56.1(b)(3)(C) Statement in Support of His Response to Defendants' Motion for Summary Judgment ("Plaintiff's Statement").

CMGT Hires Defendants

1. In July 1999, CMGT, Inc. ("CMGT") hired Defendants Mayer Brown Rowe & Maw LLP ("MBRM") and Ronald Given ("Given") (together, "Defendants") as its attorneys because CMGT's President, Lou Franco's ("Franco"), had a pre-existing personal and business relationship with Given. (Ex. 2.)

RESPONSE:

Defendants object to Paragraph 1 because it fails to comply with Local Rule 56.1 because the facts asserted therein are not material to the resolution of the Unclean Hands Motion. Defendants object to Paragraph 1 because the allegations therein relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute the allegations of Paragraph 1 because: (1) the cited exhibit

does not support the allegation that Franco and Ronald "had a pre-existing personal and business relationship;" and (2) Defendants' engagement letter provided that they were to provide legal services "in connection with [CMGT's] initial capitalization, formative acquisition activities, and other general corporate activities." (Compl. ¶2, Ex. 1 at 1.)

CMGT and SC Revise SC's Contract

2. In June 2002, Spehar Capital, LLC ("SC") asked CMGT to revise its contract. SC's owner, Gerry Spehar ("Spehar"), stated that the revisions were warranted because SC had made valuable contributions to CMGT. (*See e.g.,* Ex. 3 and Ex. 4.)

RESPONSE:

Defendants object to Paragraph 2 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citations contained therein are made to multipage documents generally rather than to a specific page of the documents cited. Defendants object to Paragraph 2 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 2 because: (1) it relies on Exhibits 2 and 3, which are inadmissible hearsay and have not been authenticated; (2) the cited exhibits do not support the allegation that "the revisions were warranted because SC had made valuable contributions to CMGT;" (3) Spehar's job was to find financing for CMGT and he never did so CMGT (Compl. ¶¶32-46; see also Gerry Dep. at 41); and (4) Franco, Baliga, Quarles and Wong believe that Spehar caused CMGT to fail (Franco Aff., Appendix Ex. B, ¶¶16, 39-40; Trustee Dep. Ex. 23; Baliga Aff., Appendix Ex. C, ¶¶6-8; Quarles Aff., Appendix Ex. D, ¶5 & Ex. A; Wong Aff., Appendix Ex. E, ¶12 & Ex. A).[1]

[1] References to "Appendix" herein are made to Defendants' Appendix of Exhibits in Support of Their Motion for Summary Judgment Based on Their Unclean Hands Defenses.

3. On September 30, 2002, CMGT and SC executed a revised contract. SC's revised contract was to expire on October 1, 2003, but could be terminated earlier. (Ex. 5.)

RESPONSE:

Defendants object to Paragraph 3 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 3 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 3 because it relies on Exhibit 5 which is inadmissible hearsay and has not been authenticated.

CMGT Approves SC to Have Discussions with Trautner and Signs a Letter of Intent with Trautner

4. On January 27, 2003, Franco asked Spehar to participate in a phone conference with Franco, Given and a CMGT shareholder, Charles Trautner ("Trautner"), to vet Trautner's ideas for restructuring CMGT into an entity he referred to as "Newco." Under Trautner's proposal, CMGT's shareholders would receive only about 20% of Newco's stock and Newco would not be responsible for CMGT's liabilities. Franco (on behalf of CMGT) rejected Trautner's "Newco" idea. (*See* Exhibits 6 and 7; *see also*, Mot. at Ex. B, Franco Aff., at ¶ 7.)

RESPONSE:

Defendants object to Paragraph 4 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) certain citations contained therein are made to multipage documents generally rather than to a specific page of the documents cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 4 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 4 because:

(1) the cited exhibits do not support the allegations that "[u]nder Trautner's proposal, CMGT's shareholders would receive only about 20% of Newco's stock and Newco would not be responsible for CMGT's liabilities;" and (2) the cited exhibits do not support the allegation that "Franco (on behalf of CMGT) rejected Trautner's 'Newco' idea."

5. Also in January 2003, Franco approved SC/Spehar to have discussions with an individual introduced to CMGT by Trautner, Harlan Smith ("Smith.") Although Smith was not formally added to Exhibit A of SC's Contract, Franco acknowledged in writing that SC was involved in discussions with him. (Ex. 8 at p. 2.)

RESPONSE:

Defendants object to Paragraph 5 because it fails to comply with Local Rule 56.1 because the facts asserted therein are not material to the resolution of the Unclean Hands Motion. Defendants object to Paragraph 5 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 5 because: (1) it relies on Exhibit 8, which is inadmissible hearsay and has not been authenticated; and (2) the cited exhibit does not support any of the allegations for which it is cited.

6. In May, 2003, Given and Trautner revived discussions about Trautner's "Newco" proposal. (Ex. 7; *see also,* Compl. at ¶ 41 and Mot. at Ex. B, Franco Aff., at ¶8.) Given spearheaded those negotiations on behalf of CMGT. (Ex. 7.) Given's negotiations resulted in the July 31, 2003, letter of intent ("LOI") that later became the Trautner Deal. (*Id.*; *see also,* Compl. at Ex. 9.) Franco's involvement in the negotiations was very limited. (Ex. 7.)

RESPONSE:

Defendants object to Paragraph 6 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 6 because the allegations therein all relate to the merits of the

case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute the allegations of Paragraph 6 because: (1) the cited exhibits do not support the allegation that "Franco's involvement in the negotiations was very limited," to the contrary, Franco was involved in fine tuning the Trautner LOI (Resp. Ex. 7 at 1 ¶1); and (2) Franco testified that, with regard to the Trautner Deal, "Over the next several weeks, on behalf of CMGT, I discussed this proposal with CMGT's shareholders, management and its professional advisors" (Franco Aff., Appendix Ex. B, ¶8).

CMGT Engages in Discussions with the Washoe

7. In July 2003, CMGT was pursuing discussions with the Washoe Tribe (the "Washoe") about a possible investment in CMGT. (*See* Ex. 9; *see also*, Mot. at Ex. B, Franco Aff., at ¶25.)

RESPONSE:

Defendants object to Paragraph 7 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) at least one citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 7 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 7 because it relies on Exhibit 9, which is inadmissible hearsay and has not been authenticated.

Franco Conditions the Trautner Deal on the Resolution Several "Lou Franco" Issues

8. On August 7, 2003, Franco asked Given to review a draft letter to Trautner regarding "Lou Franco" issues that Franco wanted resolved in the Trautner Deal -- e.g., negotiating future employment terms with Newco and resolving credit card debts, IRS obligations and personal loans. (Ex. 10.)

RESPONSE:

Defendants object to Paragraph 8 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) at least one citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 8 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 8 because it relies on Exhibit 10, which is inadmissible hearsay and has not been authenticated.

Franco Recommends the Given-Negotiated Trautner Deal to CMGT's Shareholders

9. On August 8, 2003, Franco sent CMGT's shareholders a letter recommending the Trautner Deal. He stated that there were "no alternatives." (Ex. 11.) Given helped prepare the August 8 letter. (Ex. 12.)

RESPONSE:

Defendants object to Paragraph 9 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citations contained therein are made to multipage documents generally rather than to a specific page of the documents cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 9 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 9 because: (1) it relies on Exhibits 11 and 12 which are inadmissible hearsay and have not been authenticated; and (2) the cited exhibits do not support the allegation that "Given helped prepare the August 8 letter."

SC Asks CMGT to Acknowledge that the Trautner Deal is Within the Scope of Its Contract

10. After reviewing Franco's letter to CMGT's shareholders, Spehar asked Franco to add Trautner and another potential investor, FlexBen, to Exhibit A of SC's contract. Spehar reminded Franco of the conversations that Spehar had with Trautner at Franco's request. (Ex. 6.)

RESPONSE:

Defendants object to Paragraph 10 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 10 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute the allegations of Paragraph 10 because the cited exhibit speaks for itself and Plaintiff's summary of it is inaccurate and misleading.

11. In response to Spehar, Franco stated: "[g]ot it. I'll be back..." Franco did not dispute the accuracy of Spehar's recitation of facts. (Ex. 13.)

RESPONSE:

Defendants object to Paragraph 11 because it fails to comply with Local Rule 56.1 because: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) it is argumentative. Defendants object to Paragraph 11 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 11 because: (1) it relies on Exhibit 13 which is inadmissible hearsay and has not been authenticated; (2) the cited exhibit does not support the allegation that "Franco did not dispute the accuracy of Spehar's recitation

of the facts;" (3) Franco testified that Spehar did not initiate the Trautner Deal (Franco Aff., Appendix Ex. B, at ¶8); and (4) Franco testified that Spehar was not entitled to compensation for the Trautner Deal (id. ¶14).

12. Franco forwarded Spehar's request to Given. (Ex 14.) On August 8, 2003, Given responded to Spehar on behalf of CMGT. In part, Given stated:

> Chuck [Trautner] and I have never discussed any of the prior communications to which you refer (and some of which I also participated in)" and that "as to the proposed LOI transaction, to avoid distractions, I would ask Lou to simply refer any questions you [Spehar] might have to me." Given also noted that he and Franco were "big fans" of SC's services.

(Ex. 7.)

RESPONSE:

Defendants object to Paragraph 12 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citations contained therein are made to multipage documents generally rather than to a specific page of the documents cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 12 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 12 because it relies on Exhibit 14, which is inadmissible hearsay and has not been authenticated.

13. Spehar responded to Given the next day. He stated, in part, that:

> The important and relevant question is: Did Chuck Trautner - at any point during the term of my contract [sic] - become a legitimate member of Exhibit A of that contract? The honest answer is: Yes he did. Once he legitimately became a member of Exhibit A, the Rubicon was crossed, so to speak, and Spehar Capital became entitled to be paid per its contract with CMGT.

(Ex. 15.)

RESPONSE:

Defendants object to Paragraph 13 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 13 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 13 because: (1) it relies on Exhibit 15, which is inadmissible hearsay and has not been authenticated; and (2) the exhibit cited therein is not accurately quoted.

14. Given responded to Spehar that same day (August 9, 2003). In part, Given stated:

> There is nothing left to be said regarding the LOI, in my view. If you wish to pursue it, you will be in an adversarial position and should deal with us through counsel. You have the right to do that, of course, but if you do I believe all of your activities on behalf of CMGT should cease (as well as your MOIC involvement) -- ultimately, that is not my call, however.

(Ex. 16.)

RESPONSE:

Defendants object to Paragraph 14 because it fails to comply with Local Rule 56.1 because the facts asserted therein are not material to the resolution of the Unclean Hands Motion. Defendants object to Paragraph 14 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants add that Ronald also stated to Spehar in the same email that:

> However, you [Spehar] have not succeeded in putting together anything of your own to date and are not part of the [Trautner Deal]. I encourage you to continue your work on the deals that have been carved out for you to continue with. I'm going to try to

> get the [Trautner Deal] done, but I am just as happy to work on one of your prospects. (Resp. Ex. 16 at 1 ¶1.)

15. Spehar forwarded Given's email to Franco and asked Franco for his thoughts about the dispute. (Ex. 17.) Franco forwarded Spehar's email to Given and told him, "[o]f course, you and I are completely [sic] one voice on this matter." (Ex. 18.)

RESPONSE:

Defendants object to Paragraph 15 because it fails to comply with Local Rule 56.1 because the facts asserted therein are not material to the resolution of the Unclean Hands Motion. Defendants object to Paragraph 15 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 15 because it relies on Exhibits 17 and 18 which are inadmissible hearsay and have not been authenticated. Without waiving the foregoing objections, Defendants add that Franco also purportedly stated to Ronald in the same email that, "I am very disappointed in Gerry and will discuss with you when you have some time." (Resp. Ex. 18 at 1.)

16. On August 11, 2003, Franco acknowledged in writing that FlexBen (but not Trautner) was within the scope of SC's contract even though FlexBen was not listed on Exhibit A. (Ex. 19.)

RESPONSE:

Defendants object to Paragraph 16 because it fails to comply with Local Rule 56.1 because the facts asserted therein are not material to the resolution of the Unclean Hands Motion. Defendants object to Paragraph 16 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 16 because: (1) it relies on Exhibit 19, which is inadmissible hearsay and has not been authenticated; (2) the cited exhibit does not support the

allegation that "FlexBen was not listed on Exhibit A;" and (3) the cited exhibit does not support the allegations concerning Trautner, who is not mentioned in Exhibit 19.

Given Advises Franco about the "Lou Franco" Issues

17. On August 12, 2003, Franco sent Given an email with a draft letter to Trautner attached. Franco's draft letter set forth a proposal for resolving the "Lou Franco" issues. The proposal included a $36,000 signing bonus to resolve Franco's IRS issues, a $100,900 loan to Franco so that he could immediately repay credit card obligations, and an initial salary of $180,000, with the possibility of salary increases and year-end cash bonuses. (Ex. 20.)

RESPONSE:

Defendants object to Paragraph 17 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 17 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 17 because it relies on Exhibit 20, which is inadmissible hearsay and has not been authenticated. Without waiving the foregoing objections, Defendants add that Exhibit 20 was purportedly prepared by Franco at Trautner's request. (Resp. Ex. 20 at 2 ¶1.)

CMGT Sends the Washoe an LOI

18. On August 13, 2003, Franco sent Given an e-mail stating that the Washoe wanted to do a deal and that they would accelerate their evaluation of CMGT because they "can do deals quickly…i.e., in 30-60 days." Franco stated, "I believe the interest is real and that we should provide Andrea with a suggested LOI format (a succinct version would be best) as she requested and see what develops." Franco attached a draft LOI that Sephar had prepared. (Ex. 21.)

RESPONSE:

Defendants object to Paragraph 18 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 18 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 18 because: (1) it relies on Exhibit 21, which is itself inadmissible hearsay, contains hearsay statements from other persons and has not been authenticated; (2) the cited exhibit does not support the allegation that "the Washoe wanted to do a deal"; (3) the Washoe never signed a letter of intent to provide CMGT with financing (Compl. ¶46; Gerry Dep. at 48-51); (4) the Washoe never provided CMGT with any financing (id.); and (5) the Washoe were not in the business of investing in companies like CMGT (Franco Aff., Appendix Ex. B, at ¶34).

19. The next day, August 14, 2003, Spehar sent Franco a revised LOI for the Washoe. Franco forwarded the draft LOI to Given for his review and comment. (Ex. 22.) Given suggested sending the Washoe the Trautner LOI with the "20 percentage [sic] deleted." Franco responded that he did not want to "set the bar down as low as the Newco LOI & encourage a similar offer...I sense the Tribe has an appetite for a much better deal for CMGT..." (Ex. 23.)

RESPONSE:

Defendants object to Paragraph 19 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citations contained therein are made to multipage documents generally rather than to a specific page of the documents cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 19 because the

allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 19 because: (1) it relies on Exhibits 22 and 23 which are inadmissible hearsay and have not been authenticated; (2) Spehar sent Franco the so-called "revised LOI" on August 13, 2003; (3) the cited exhibit does not support the allegation that "Franco forwarded the draft LOI to Given for his review and comment;" (4) the LOI at issue in Exhibit 23 is not the same LOI at issue in Exhibit 22; (5) the Washoe never signed a letter of intent to provide CMGT with financing (Compl. ¶46; Gerry Dep. at 48-51); (6) the Washoe never provided CMGT with any financing (id.); and (7) the Washoe were not in the business of investing in companies like CMGT (Franco Aff., Appendix Ex. B, at ¶34).

20. Later that day (August 14), Franco instructed SC to send the Washoe an LOI, which he had approved, that gave the Washoe until September 30, 2003 to complete due diligence. SC carried-out Franco's instruction. (Ex. 24; see also, Exs. 21 & 22.)

RESPONSE:

Defendants object to Paragraph 20 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citations contained therein are made to multipage documents generally rather than to a specific page of the documents cited. Defendants object to Paragraph 20 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 20 because: (1) it relies on Exhibits 21, 22 and 24, which are inadmissible hearsay and have not been authenticated; (2) the cited exhibits do not support the allegation that "SC carried-out Franco's instruction;" (2) Franco testified that he "became dissatisfied with the way that Speahr was handling the discussions with the Washoe and became concerned that he was

acting erratically and not in CMGT's best interests" (Franco Aff., Appendix Ex. B, ¶27); (3) Franco testified that Spehar directly contravened his instructions regarding the Washoe negotiations (id. ¶29); and (4) the cited exhibits do not support the allegation that the subject LOI "gave the Washoe until September 30, 2003 to complete due diligence," to the contrary, no LOI is attached to Exhibit 24 whatsoever.

Trautner Approves Franco's Proposals for Resolving the "Lou Franco" Issues

21. On August 14, 2003, Franco sent Trautner a letter with Franco's proposals for resolving the "Lou Franco" issues. On August 15, 2003, Trautner agreed to Franco's proposals. (Ex. 25.)

RESPONSE:

Defendants object to Paragraph 21 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 21 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 21 because: (1) it relies on Exhibit 25, which is inadmissible hearsay and has not been authenticated; and (2) none of the allegations therein are supported by the cited exhibit because Exhibit 25 contains a draft letter to Trautner that Franco sent to Given and that is dated August 18, 2003 and Exhibit 25 contains no correspondence at all from Trautner.

CMGT Seeks Shareholder Approval of the Trautner Deal and Rejects SC's Settlement Attempts

22. On August 16, 2003, Franco sent CMGT's shareholders a letter (dated August 15) seeking their approval of the Trautner Deal. Franco did not disclose CMGT's negotiations with the Washoe, Franco's belief that the Washoe's interest was real, or Franco's belief that

the Washoe wanted to consummate a deal that would be better for CMGT than the Trautner Deal. (Ex. 26.) Given helped prepare the August 15 letter. (Ex. 27.)

RESPONSE:

Defendants object to Paragraph 22 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citations contained therein are made to multipage documents generally rather than to a specific page of the documents cited; (3) it contains multiple sentences and facts rather than a short statement of fact; and (4) it is argumentative. Defendants object to Paragraph 22 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 22 because: (1) it relies on Exhibits 26 and 27, which are inadmissible hearsay and have not been authenticated; (2) the Washoe never signed a letter of intent to provide CMGT with financing (Compl. ¶46; Gerry Dep. at 48-51); (3) the Washoe never provided CMGT with any financing (id.); (4) the Washoe were not in the business of investing in companies like CMGT (Franco Aff., Appendix Ex. B, at ¶34); (5) the cited exhibit does not support the allegation that Franco believed "that the Washoe's interest was real;" (6) the cited exhibit does not support the allegation that "that the Washoe wanted to consummate a deal that would be better for CMGT than the Trautner Deal;" and (7) Franco testified that, "At the time CMGT and its shareholders accepted the Trautner [Deal], there was no bona fide financing available to CMGT, much less better financing (Franco Aff., Appendix Ex. B, at ¶21).

23. Meanwhile, Spehar trying [sic] to resolve SC's contract dispute regarding the Trautner Deal. On August 19, 2003, Spehar sent Franco and Given an email regarding the discussions of the dispute. In part, Spehar stated:

> Ron [Given], in between your many epithets and derogatory comments, you were extremely dismissive today of my efforts to discuss a settlement based on

> honoring Spehar Capital's contract. You encouraged me to 'bring it on' and told me that you were 'not afraid' because whatever I do would not affect the deal. In your words: 'This deal will go forward!' [sic]

(Ex. 28.)

RESPONSE:

Defendants object to Paragraph 23 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 23 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 23 because: (1) it relies on Exhibit 28, which is inadmissible hearsay and has not been authenticated; and (2) the cited exhibit does not support the allegation that "[m]eanwhile, Spehar trying [sic] to resolve SC's contract dispute regarding the Trautner Deal." Without waiving the foregoing objections, Defendants add that Spehar's purported email also demanded that "Spehar Capital [] be <u>fully</u> <u>compensated</u> - by CMGT/'Oldco' and 'Newco' - under its Agreement with CMGT should CMGT consummate its pending deal with Chuck Trautner's 'Newco,'" which, to Spehar included an extensive list of demands. (Resp. Ex. 28 at 1 ¶7 (emphasis added); Resp. Ex. 39.)

24. Given responded that same day. He stated, in part, that:

> [f]rom a legal point of view, we simply cannot play your game of throwing E-Mails back and forth. We have talked to you. We have listened to you. We have told you our view. I'm sorry, but we can do no more...you have told us you have counsel. I will henceforth deal only with him or her, as is appropriate.

(Ex. 29.)

RESPONSE:

Defendants object to Paragraph 24 because it fails to comply with Local Rule 56.1 because the facts asserted therein are not material to the resolution of the Unclean Hands Motion. Defendants object to Paragraph 24 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants add that Ronald also stated in his email to Gerry that:

> I very much regret, Gerry, that from my lawyer's perspective it seems you have always focused so much on yourself and churning words that you have forgotten that your job was to raise money. You have never been in a better position to actually do your job (go out and get someone to beat the LOI for heaven's sakes!), but you choose to squander your energy spending all you time on nonsense like this. (Resp. Ex. 29 at 1 ¶1.)

25. On August 21, 2003, Spehar sent an email to Franco, stating:

> I remain agreeable to further legitimate attempts to resolve this dispute amicably. As stated on our call, however, your delays and the pace of events are quickly forcing my hand...Please seek a second legal opinion and reconsider -- you run CMGT, not Ron Given.

(Ex. 30.)

RESPONSE:

Defendants object to Paragraph 25 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 25 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 25

because: (1) it relies on Exhibit 30, which is inadmissible hearsay and has not been authenticated; (2) Spehar's settlement demands were unreasonable; (Franco Aff., Appendix Ex. B, ¶¶14-16 & 43; Baliga Aff., Appendix Ex. C, ¶6; Wong Aff., Appendix Ex. E, ¶5); and (3) Spehar demanded to be "fully compensated" for the Trautner Deal which, to Spehar, included an extensive list of demands (Resp. Ex. 28 at 1 ¶7 (emphasis added); Resp. Ex. 39).

26. Franco forwarded Spehar's email to Given and stated, "[m]y trust is in you and remains so." (Ex. 31.) Given advised Franco to "[j]ust let it be." (Ex. 32.)

RESPONSE:

Defendants object to Paragraph 26 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citations contained therein are made to a multipage documents generally rather than to a specific page of the documents cited. Defendants object to Paragraph 26 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 26 because: (1) it relies on Exhibit 31, which is inadmissible hearsay and has not been authenticated; and (2) it relies on Exhibit 32, which is inadmissible hearsay, in part, and has not been authenticated, in part. Without waiving the foregoing objections, Defendants add that Franco's purported email to Ronald also stated that: "FYI, I just received this from Gerry. Obviously, much of his 'memorialization' is for effect, not accurate and is twisted into his distortion of reality. He still thinks his contract and interpretation thereof are clear as a bell and is unwilling to be flexible." (Resp. Ex. 31 at 1.)

27. In Franco's affidavit, which is Exhibit B to Defendants' Motion, Franco stated that he discussed a settlement proposal with Spehar that involved Newco paying SC "$250,000 or so" post-closing. (Mot. at Ex. B, Franco Aff., at ¶ 15.) None of the contemporaneous documents

produced to Plaintiffs, including the documents produced by Defendants, make any reference to Franco's alleged settlement proposal. (*See generally*, Pl. App. of Exhibits.) Moreover, Spehar disputes that Franco ever told him about any such proposal. (Ex. 33.)

RESPONSE:

Defendants object to Paragraph 27 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) one citation contained therein is made to dozens of documents generally rather than to a specific page of any document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 27 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute the allegations of Paragraph 27 because: (1) Franco testified that he made a settlement offer of $250,000 or so to Spehar, who rejected it (Franco Aff., Appendix Ex. B, ¶15); (2) Franco, Baliga and Wong testified that they believed that Spehar's settlement demands were unreasonable (Franco Aff., Appendix Ex. B, ¶¶14-16 & 43; Baliga Aff., Appendix Ex. C, ¶6; Wong Aff., Appendix Ex. E, ¶5); and (3) Spehar demanded to be "fully compensated" for the Trautner Deal which, to Spehar, included an extensive list of demands (Resp. Ex. 28 at 1 ¶7 (emphasis added); Resp. Ex. 39).

Defendants Tell Trautner About SC's Contract Dispute, Advise Trautner How to Protect Newco Against a Deal Disruption and Propose that Trautner Pay Legal Fees to MBRN

28. On August 22, 2003, Given sent a memo to Trautner and Trautner's attorney, John Politan ("Politan"), that disclosed SC's contract dispute regarding the Trautner Deal. Given stated that he thought Spehar was simply "rattling [his] sword a bit." Given also provided his strategy for protecting Newco (Politan's client) in the event that SC was able to stop or unwind the deal. In that regard, Given stated that the deal documents should have CMGT (Given's client): (a) indemnify Newco against third-party claims, (b) allow Newco to escrow the purchase price to cover the indemnification, and (c) grant Newco a "perpetual, nonexclusive license" covering CMGT's software and business methods. Given also recommended that

Newco be formed and enter into an employment agreement with Franco. Given (CMGT's attorney) then stated:

> Interestingly enough, they [SC and Dick Ross] may have actually improved the deal from Newco's perspective. With the license, if either Gerry or Dick [a shareholder who had a dispute with CMGT] was successful in disrupting the deal, you [Trautner] could walk away with the software and, most importantly, Lou Franco without making any payment to CMGT whatsoever.

(Ex. 34.) (Emphasis added.)

RESPONSE:

Defendants object to Paragraph 28 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 28 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute the allegations of Paragraph 28 because: (1) the cited exhibit does not support the allegation that "Given stated that he thought Spehar, was simply 'rattling [his] sword a bit,'" to the contrary, Ronald stated that "[Spehar had] nothing to lose by rattling [his] sword[] a bit; and (2) the cited exhibit speaks for itself and Plaintiff's summary of it is inaccurate and misleading.

29. Given then proposed that Trautner/Newco pay Defendants: (a) $50,000 for MBRM's accrued legal fees immediately, (b) $50,000 for accrued fees when the Trautner Deal closed, and (c) the entire amount of Defendants' expenses and legal fees incurred from July 31, 2003 through closing. Given threatened to stop working on the Trautner Deal if the payment issue was not promptly resolved. He also solicited future business from Newco. (*Id.*)

RESPONSE:

Defendants object to Paragraph 29 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 29 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute the allegations of Paragraph 29 because the cited exhibit does not support the allegation that "Given threatened to stop working on the Trautner Deal if the payment issue was not promptly resolved." To the contrary, Given stated:

> Out of a sense of commitment to Lou and CMGT, I have taken you to a point of success without asking for a thing. However, if Mayer Brown is to continue in our role, arrangements must be made for our payment. I am part of a partnership, and that partnership wants me to work on matters that pay. (Resp. Ex. 34 at 2, ¶2.)

Without waiving the foregoing objections, Defendants add that the $100,000 requested was less than 45% of Defendants' total fees outstanding -- $235,000. (Id.)

30. The next day (August 23), Franco addressed MBRM legal fee's [sic] with Given as follows:

> Chuck [Trautner] wants to work something out with you [Given]/MBRM that will not 'look funny', even if he [Trautner] has to personally 'take care of it.' I told him that you had sent a letter to him and that he should refer to it on this subject. He had not yet picked-up your letter from John Politan's office.

(Ex. 35.)

RESPONSE:

Defendants object to Paragraph 30 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 30 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 30 because it relies on Exhibit 35, which is inadmissible hearsay and has not been authenticated.

Given and Franco Tell CMGT's Shareholders about the SC Dispute

31. On August 27, 2003, Franco sent CMGT's shareholders a letter regarding the Trautner Deal. (Ex. 36.) Given wrote that letter. (Ex. 37.) The letter stated: (a) SC has claimed that it is entitled to compensation as a result of the Trautner Deal, (b) CMGT and its legal counsel strongly disagree with that contention, (c) SC's claim should not delay or hinder the proposed transaction, (d) the appropriate venue for the resolution of SC's claim will be in the winding up of CMGT, (e) as a result of SC's claim, Newco will require indemnification and an escrow of the shares, (f) to protect against any threat to a break-up of the transaction after it is consummated, Newco will require an independent license to CMGT's software that would survive a break-up, and (g) the only substantive effect of SC's claim will be additional documentation complexity and a delay in the winding up of CMGT until such time as the escrow is released. (Ex. 36.)

RESPONSE:

Defendants object to Paragraph 31 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citations contained therein are made to multipage documents generally rather than to a specific page of the documents cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 31 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 31 because:

(1) it relies on Exhibits 36 and 37, which are inadmissible hearsay and have not been authenticated; (2) the cited exhibits speak for themselves and Plaintiff's summary of them is inaccurate and misleading; (3) the cited exhibits do not support the allegation that Ronald "wrote" Franco's August 26 letter, to the contrary, Ronald drafted the letter and received revisions from Franco (Resp. Ex. 37); and (4) the cited exhibits do not support the allegation that "SC's claim should not delay or hinder the proposed transaction," to the contrary, the letter states that Spehar's claim "should not be allowed to delay or hinder the [Trautner Deal]." Without waiving the foregoing objections, Defendants add that the purported August 26 letter also states that "CMGT's numerous conversations with Gerry [regarding his claim to compensation] have not been productive." (Resp. Ex. 36 at 1 ¶3.)

The Washoe Commit to Deliver A Signed LOI By September 2

32. On August 29, 2003, the Washoe sent Spehar an email stating, "[w]e are very interested in this opportunity...I will commit to you to have a signed LOI on Tuesday September 2 if not sooner." (Ex. 38.)

RESPONSE:

Defendants object to Paragraph 32 because it fails to comply with Local Rule 56.1 because the facts asserted therein are not material to the resolution of the Unclean Hands Motion. Defendants object to Paragraph 32 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 32 because: (1) it relies on Exhibit 38, which is inadmissible hearsay and has not been authenticated; (2) the cited email is from Garrett Furuichi and there is no evidence he had authority to speak for the Washoe; (3) the Washoe never signed a letter of intent to provide CMGT with financing (Compl. ¶46; Gerry Dep. at 48-51); (4) the Washoe never provided CMGT with any financing (id.); and (5) the Washoe were

not in the business of investing in companies like CMGT (Franco Aff., Appendix Ex. B, at ¶34).

Given Advises Franco to "Ignore" SC's Contract Dispute

33. On August 31, 2003, Spehar sent Franco an email asserting that certain compensation provisions of SC's contract were trigged [sic] when CMGT's shareholders voted in favor of the Trautner Deal and chose to accept Newco stock. (Ex. 39.)

RESPONSE:

Defendants object to Paragraph 33 because it fails to comply with Local Rule 56.1 because the facts asserted therein are not material to the resolution of the Unclean Hands Motion. Defendants object to Paragraph 33 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 33 because it relies on Exhibit 39, which is inadmissible hearsay and has not been authenticated. Without waiving the foregoing objections, Defendants add that Exhibit 39 contains a list of Spehar's demands that is inconsistent with the Trustee's suggestion that Spehar was open to a reasonable compromise of his purported claims.

34. Franco asked Given if he should respond to Spehar's email in a "legal fashion." (Ex. 40.) Franco advised Given to "ignore it." (Ex. 41 at p. 2.)

RESPONSE:

Defendants object to Paragraph 34 because it fails to comply with Local Rule 56.1 because the facts asserted therein are not material to the resolution of the Unclean Hands Motion. Without waiving the foregoing objections, Defendants dispute Paragraph 34 because: (1) it relies on Exhibit 40, which is inadmissible hearsay and has not been authenticated. Defendants object to Paragraph 34 because the allegations therein all relate to the merits of the

case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute the allegations of Paragraph 34 because: (1) the cited exhibits speak for themselves and Plaintiff's summary of them is inaccurate and misleading; and (2) the cited exhibits do not support the allegation that "Franco advised Given to 'ignore it.'" To the contrary, in the purported email, Ronald stated, "This is nothing new. I would ignore [Spehar's demand]. Do share it with [Baliga] and [Wong], though. . . . ." (Resp. Ex. 41 at 2.)

35. On September 1, 2003, Franco sent Given a draft summary of CMGT's potential corporate liabilities for his review. With respect to SC's contract dispute, the summary stated, "[n]o legal action required," "[l]ikelihood of settlement is high if legal action is taken against CMGT," "MBR&M and Management agree there is no basis for a claim," "G. Spehar has indicated he will take legal action to enforce his contract based on his previous introductions to/discussions with Chuck Trautner & various investors," degree of risk is "high," and no curative action is required. (Ex [sic] 42.)

RESPONSE:

Defendants object to Paragraph 35 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 35 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 35 because: (1) it relies on Exhibit 42 which is inadmissible hearsay and has not been authenticated; (2) the cited exhibit speaks for itself and Plaintiff's summary of it is inaccurate and misleading; and (3) the cited exhibit does not support the allegation that "the summary stated, '[n]o legal action required,'" regarding Spehar's claim, as the cited exhibit contains no such language.

36. On September 2, 2003, Franco sent a final version of that summary, which was unchanged with respect to SC's contract dispute, to a representative of Trautner's investment group, Peter Bentz ("Bentz"). (Ex. 43.)

RESPONSE:

Defendants object to Paragraph 36 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 36 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 36 because: (1) it relies on Exhibit 43, which is inadmissible hearsay and has not been authenticated; (2) the cited exhibit does not support the allegation that Bentz was "a representative of Trautner's investment group;" and (3) the cited exhibit does not support the allegation that any attachments to the purported September 2 email were "final."

The Washoe Deliver a Letter of Intent

37. On September 2, 2003, John Crishon ("Crishon"), a Siemens employee who was involved with the Washoe negotiations, told Franco and Spehar that they should be receiving "the signed Non-Disclosure & LOI documents" from the Washoe shortly. Crishon also stated that the Washoe had hired both an attorney and several call center companies to review CMGT's proposal. (Ex. 44.)

RESPONSE:

Defendants object to Paragraph 37 because it fails to comply with Local Rule 56.1 because the facts asserted therein are not material to the resolution of the Unclean Hands Motion. Defendants dispute the allegations of Paragraph 37 because the allegations therein all relate to the merits of this case, about which no discovery has been done. Without waiving the foregoing objections, Defendants dispute Paragraph 37 because: (1) it relies on Exhibit 44,

which is inadmissible hearsay and has not been authenticated; (2) the Washoe never signed a letter of intent to provide CMGT with financing (Compl. ¶46; Gerry Dep. at 48-51); (3) the Washoe never provided CMGT with any financing (id.); and (4) the Washoe were not in the business of investing in companies like CMGT (Franco Aff., Appendix Ex. B, at ¶34).

38. That same day, the Washoe delivered an unsigned letter of intent to Spehar on the Washoe's letterhead. (Compl. Ex. 6.) Spehar e-mailed that LOI to Franco and Given. (Ex. 45; *see also*, Ex. 46.)

RESPONSE:

Defendants object to Paragraph 38 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citations contained therein are made to multipage documents generally rather than to a specific page of the documents cited. Defendants object to Paragraph 38 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 38 because: (1) it relies on Exhibits 45 and 46 which are inadmissible hearsay and have not been authenticated; (2) the cited exhibits do not support the allegation that "the Washoe delivered an unsigned letter of intent to Spehar on the Washoe's letterhead," to the contrary, it is unclear where the unsigned LOI came from and the unsigned LOI attached to Franco's September 2 email is not on Washoe letterhead; (3) the Washoe never signed a letter of intent to provide CMGT with financing (Compl. ¶46; Gerry Dep. at 48-51); (4) the Washoe never provided CMGT with any financing (id.); and (5) the Washoe were not in the business of investing in companies like CMGT (Franco Aff., Appendix Ex. B, at ¶34).

Given Modifies the Washoe LOI

39. On September 3, Given sent revised copies of the Washoe's LOI to SC and Franco. (Ex. 47 and Ex. 48.) Given shortened the due diligence deadline from September 30 to September 29. (Compl. Ex. 7.) He also included language that allowed CMGT to close a competing bid (*e.g.*, the Trautner Deal) at any time prior to September 30. (*Id.*)

RESPONSE:

Defendants object to Paragraph 39 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) one citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 39 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 39 because: (1) it relies on Complaint Exhibit 7, which is inadmissible hearsay and has not been authenticated; (2) the cited exhibits do not support the allegation that "Given sent revised copies of the Washoe's LOI to SC and Franco," to the contrary, Exhibits 47 and 48 are missing their attachments, so there is no evidence that Ronald made the alleged changes or that the letter attached as Exhibit 7 to the Complaint was drafted by Ronald; (3) the Washoe never signed a letter of intent to provide CMGT with financing (Compl. ¶46; Gerry Dep. at 48-51); (4) the Washoe never provided CMGT with any financing (id.); and (4) the Washoe were not in the business of investing in companies like CMGT (Franco Aff., Appendix Ex. B, at ¶34).

40. Later that day (September 3), Spehar sent Franco and Given a revised LOI that Spehar had prepared. Spehar's revised LOI incorporated Given's September 29 due diligence deadline, but removed CMGT's ability to close a competing deal before the Washoe finished its due diligence. (Ex. 49.) Spehar asserts that Franco told him to send his revised LOI to the Washoe, which Spehar did on September 3. (Ex. 50 and Ex. 51.) Franco asserts that he did not authorize SC to send that LOI to the Washoe. (Ex. 51.)

RESPONSE:

Defendants object to Paragraph 40 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citations contained therein are made to a multipage documents generally rather than to a specific page of the documents cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 40 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 40 because: (1) it relies on Exhibits 49, 50 and 51 which are inadmissible hearsay and have not been authenticated; (2) the cited exhibits do not support the allegation that the alleged changes were suggested or required by Ronald (see Response to ¶39); (3) Exhibit 50 does not include the attached LOI, so it is contents are unknown; (4) the Washoe never signed a letter of intent to provide CMGT with financing (Compl. ¶46; Gerry Dep. at 48-51); (5) the Washoe never provided CMGT with any financing (id.); and (6) the Washoe were not in the business of investing in companies like CMGT (Franco Aff., Appendix Ex. B, at ¶34). Without waiving the foregoing objections, Defendants add that Franco purportedly stated to Gerry in Exhibit 51 that, "As with many other contacts, I brought you into the Washoe deal to represent and advise us, not to unilaterally handle things as you see fit." (Resp. Ex. 51 at 1 ¶4.) Defendants further add that Franco stated to Ronald in Exhibit 51 that:

> I am not going to respond to Gerry' e-mail. He does not have an accurate recall of what happened, wants to run the show, his attitude is adversarial and I am inclined to terminate his contract now . . . I was not happy with the way Gerry barraged you with e-mails last night after I told him you needed to Wahsoe's phone number and would be making the call. (Id. at 2.)

The Washoe Reject the Revised LOI

41. On September 4, Franco instructed Spehar to tell the Washoe about Given's additional revisions, e.g., that CMGT could close a competing deal prior to September 29. Spehar warned Franco that the Washoe would not agree to that change, but Franco insisted that Spehar tell the Washoe about Given's revisions. (Ex. 52.) Franco then sent Given an email, confirming that he would support Given's terms to protect the Trautner Deal:

> Gerry [Spehar] contends nothing less than CMGT 'guarantee' that no closing will occur until at least 9/30 will satisfy them [the Washoe] because they intend to use an expensive Philadelphia law firm to accelerate their review/due diligence to be able to commit to [sic] funding by 9/30. Of course, we are using 9/29 as the significant date!

(Ex. 53.)

RESPONSE:

Defendants object to Paragraph 41 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) at least one citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 41 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 41 because: (1) it relies on Exhibits 52 and 53 which are inadmissible hearsay and have not been authenticated; (2) the cited exhibits do not support the allegation that the alleged changes were suggested or required by Ronald (see Response to ¶39); (3) Exhibit 52 states that the proposed revisions were suggested by both Franco and Ronald; (4) Exhibit 52 states that the Washoe could not complete due diligence by September 29, and says nothing about CMGT's ability to close a deal before September 29; (5) the Washoe never signed a letter of intent to provide CMGT with financing (Compl. ¶46; Gerry Dep. at 48-51); (6) the Washoe never provided

CMGT with any financing (id.); and (7) the Washoe were not in the business of investing in companies like CMGT (Franco Aff., Appendix Ex. B, at ¶34).

42. Spehar followed Franco's instructions and told the Washoe about Given's additional revisions. (Ex.. 52.) The Washoe told Spehar that it would not agree to Given's changes to the LOI. (*Id.*) After learning that the Washoe had rejected the revised LOI, Franco asked Given whether he should suggest to the Washoe that they "step into" the Trautner investment group's position. (Ex. 54.)

RESPONSE:

Defendants object to Paragraph 42 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 42 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 42 because: (1) it relies on Exhibits 52 and 54, which are inadmissible hearsay and have not been authenticated; (2) the cited exhibits do not support the allegation that the alleged changes were suggested or required by Ronald (see Response to ¶39); (3) the Washoe never signed a letter of intent to provide CMGT with financing (Compl. ¶46; Gerry Dep. at 48-51); (4) the Washoe never provided CMGT with any financing (id.); and (5) the Washoe were not in the business of investing in companies like CMGT (Franco Aff., Appendix Ex. B, at ¶34). Without waiving the foregoing objections, Defendants add that Franco stated in his purported email to Ronald that:

> I believe Gerry mishandled this situation in several ways, including telling the Washoe he thought The Washoe would have until 10/15(17) because he saw that date in the [Trautner] LOI/Proxy form - once this expectation was floated I am sure The Washoe were effectively conditioned to expect CMGT would "guarantee" them "exclusive" time until 9/30 and possibly into October. This

> is why the timing issue became a flash point and effort to get us talking by phone failed.
>
> It also didn't help when Gerry recently sent The Washoe a draft LOI that was supposed to be discussed between you, me and Gerry ONLY. Unfortunately, I believe Gerry's adversarial position with us is adversely affecting his judgment.
>
> FYI, Gerry also told me he tried everything he could to keep these guys talking, including telling them "[he was] sure CMGT would give more time if pressed for it." This, of course, was another unauthorized representation on his part and I consistently told Gerry CMGT needs to keep its options open.
>
> Gerry says the door is still open, but only if we guarantee The Washoe that we will not close another deal before 10/17. I do not see how we can possibly do this. However, if you see a compromise we can live with perhaps we can reconnect with them through a teleconference with you and me on the line to be sure our message is delivered correctly.
>
> Perhaps I should send The Washoe a letter over my signature that thanks them for their consideration with an expression of what we are willing to do under the circumstances, so we don't burn any bridges and are assured our message gets to them accurately - Perhaps suggesting that they consider "stepping into the [Trautner] Group position" may be an option here? (Resp. Ex. 54.)

43. In response, Given arranged a phone call between himself and the Washoe. (*See* Ex [sic] 55, Ex [sic] 56 and Ex. 57.) There were no discussions during that call about the Washoe "stepping into" the Trautner group position. (Spehar Dep. Tr. dated 1/21/09 at 63:4-64:10.) Because Given shortened the due diligence deadline and would not guarantee that CMGT would not close a competing deal prior to the Washoe completing due diligence, the Washoe terminated its negotiations with CMGT. (Ex. 58.)

RESPONSE:

Defendants object to Paragraph 43 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) one citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts

rather than a short statement of fact. Defendants object to Paragraph 43 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 43 because: (1) it relies on Exhibits 55 and 56, which are inadmissible hearsay, and Exhibit 57, which is inadmissible hearsay, in part, and has not been authenticated, in part; (2) the cited exhibits do not support the allegation that the alleged changes were suggested or required by Ronald (see Response to ¶39); (3) the cited exhibits do not support the allegation that "[t]here were no discussions during that call about the Washoe 'stepping into' the Trautner group position," to the contrary, that issue was not discussed at the place cited in Gerry's deposition; (4) the cited exhibits do not support the allegation that the Washoe terminated negotiations with CMGT because CMGT "would not guarantee that CMGT would not close a competing deal prior to the Washoe completing due diligence," to the contrary, that issue is not mentioned in Gerry's September 5 email (Resp. Ex. 58); (5) the Washoe never signed a letter of intent to provide CMGT with financing (Compl. ¶46; Gerry Dep. at 48-51); (6) the Washoe never provided CMGT with any financing (id.); and (7) the Washoe were not in the business of investing in companies like CMGT (Franco Aff., Appendix Ex. B, at ¶34).

SC Notifies CMGT and Defendants That it is Going to Court to Ask for a TRO

44. On September 9 and 11, 2003, SC notified Given that it was seeking a TRO to prevent the Trautner Deal from closing. (*See* Group Ex. 59 and Group Ex. 60.) SC obtained a TRO on September 12, 2003. (Def. SOF at ¶39.)

RESPONSE:

Defendants object to Paragraph 44 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citations contained therein are made to multipage documents generally

rather than to a specific page of the documents cited. Defendants object to Paragraph 44 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 44 because it relies on Exhibits 59 and 60 which are inadmissible hearsay and have not been authenticated.

CMGT Receives $20,000 From Trautner

45. On or about September 12, 2003, CMGT received $20,000 from Trautner. (Ex. 61.)

RESPONSE:

Defendants object to Paragraph 45 because it fails to comply with Local Rule 56.1 because the facts asserted therein are not material to the resolution of the Unclean Hands Motion. Defendants object to Paragraph 45 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 45 because it relies on Exhibit 61, which is inadmissible hearsay and has not been authenticated.

Given Provides Trautner's Attorney with a Nine-Point Strategy For Responding to a Potential TRO and Given Demands a $50,000 Legal Fee Payment

46. On September 14, 2003, Given sent a memo to Politan (Trautner's attorney). The first issue Given addressed was Defendants' fees. He told Politan what needed to be put into a letter on Politan's letterhead regarding the Trautner group's payment of Defendants' fees. (Ex. 62.)

RESPONSE:

Defendants object to Paragraph 46 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally

rather than to a specific page of the document cited. Defendants object to Paragraph 46 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants add that the proposed payments of Defendants' legal unpaid legal fees were less than half of the total amount owed by CMGT. (Resp. Ex. 62 at 1.)

47. Given then explained to Politan that the work he (Given) needed to do (and be paid for) included "cleaning up Lou Franco's credit card situation." Given next discussed timing issues. He stated that CMGT's shareholder approval of the Trautner Deal was going to expire on October 17, 2003. He also stated his understanding that Trautner's investment group might prefer a later closing date, but thought pushing the date back was a bad idea because (a) a later closing dated would require another shareholder solicitation, and (b) he did not think Franco could "hold out much longer." (Ex. 62.)

RESPONSE:

Defendants object to Paragraph 47 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 47 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute the allegations of Paragraph 47 because the cited exhibit speaks for itself and Plaintiff's summary of it is inaccurate and misleading.

48. As a consequence of Franco's credit card situation and the possibility of a pre-transaction SC TRO, Given advised Politan to form Newco as soon as possible and to have Newco immediately enter into an employment agreement with Franco. He stated, "this is the only way to get him [Franco] focused on building Newco's business instead of dealing with less productive things such as the Spehar TRO." (Ex. 62.)

RESPONSE:

Defendants object to Paragraph 48 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 48 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute the allegations of Paragraph 48 because the cited exhibit speaks for itself and Plaintiff's summary of it is inaccurate and misleading.

49. Given then discussed the possibility of SC obtaining a pre-transaction TRO, and he provided Politan with the following nine-point strategy:

> The Spehar TRO may mandate the approach we should now take anyway ... whether we are simply dealing with threats of a pre-transaction TRO, or an actual TRO, I think the following [nine-point] strategy makes sense:
>
> 1. We notify CMGT's shareholders of the threats of the TRO or send them a copy of the actual TRO if it is in fact issued.
>
> 2. Lou Franco and Newco [enter] into an employment agreement, which will confirm the arrangements to deal with Franco's debts and to move him to Phoenix.
>
> 3. I subsequently notify the shareholders (using the E-mail list that includes Spehar) that neither Franco nor Newco has any <u>desire</u> to expend time or funds to engage in litigation, even if they firmly believe the Spehar litigation is frivolous. As a consequence of the Spehar TRO, I will announce that Lou intends to resign and that Newco intends to terminate the LOI. I also announce that I have not been retained to deal with the TRO. Lou's previous correspondence with the shareholders has made it clear that he is on the verge of financial collapse and will need to move on to other opportunities if a transaction cannot happen. Neither Newco nor any other third-party investor group could be expected to get bogged down in this type of litigation when they have many viable alternatives.

4 When I notify the shareholders that Lou Franco intends to resign, I will indicate that he will do all he can [to] make arrangements for the servicing of the existing contracts to avoid default and the consequent potential shareholder liability.

5. Spehar will have to return to court to make the TRO permanent. My notice to the shareholders (which includes at least one California lawyer) will give them an opportunity to take their own actions against Spehar. His TRO may simply be dissolved, or he may be convinced to give up his efforts to disrupt the transaction beforehand. In either case, the uncertainty and delay he will have caused will make it reasonable to ask the shareholders to extend the October 17 deadline.

6. If the Spehar situation does not resolve itself, I think Newco should simply start on its own with Lou Franco as its president and CEO. Newco would enter into a commercial transaction to service, in the name of CMGT, Inc., its existing four contracts. In effect, CMGT, Inc., will outsource the servicing of its existing book of business to Newco pursuant to arm's-length agreements. When these existing contracts expire, the clients would be free to roll over their accounts to Newco. For this service, Newco would be paid for its expenses. Any excess amounts could be returned to CMGT, but this would only be done after netting everything Newco has paid on CMGT, Inc.'s behalf **(including legal fees and expenses).** This outsourcing arrangement would require Newco to enter into a service arrangement with Rob Crandall and other Canadian employees, just like it would in the transaction contemplated by the LOI. I am very confident they would cooperate.

7. Depending on the actual language of the TRO, if it is issued, I think it would be reasonable for Newco to also be granted a license in the software. Again depending on the language of the TRO, we might structure this as an option to acquire a license in the software. I would like to note that if for whatever reason such a license is not deemed appropriate or desirable, Lou Franco is comfortable that we can independently create appropriate software which will not infringe on anything belonging to CMGT, Inc.

8. If the outsourcing alternative is consummated, CMGT, Inc. will not receive any shares of Newco. Also, Newco will not have to be immediately capitalized at the $2.5 million level. CMGT, Inc. and Newco would, of course, be free to subsequently enter into a transaction like that contemplated by the LOI after the Spehar situation is clarified. It may be no longer in Newco's interests to do so, however, in which case all Spehar will have accomplished is to (have deprived the CMGT, Inc. shareholder/stakeholder group of a 20% interest in Newco. This is not Newco's fault and is, frankly, beyond its control. I think everything

that could be done to be fair to the CMGT, Inc. shareholder/stakeholder group has been done.

9. I believe the outsourcing alternative could be the **functional equivalent** of the transaction contemplated by the LOI. The only difference is that Newco would not be receiving exclusive rights in the software. As a practical matter, however, once Lou Franco leaves CMGT, Inc., there is no one left to do anything with the software anyway.

(Ex. 62.) (Emphasis added.) (Hereafter, Given's strategy for consummating the Trautner Deal without any payment to CMGT is referred to as the "functional equivalent" deal.)

RESPONSE:

Defendants object to Paragraph 49 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 49 because the allegations therein all relate to the merits of the case, about which discovery has not been taken.

50. Given ended his letter to Politan by stating, "I simply cannot proceed further unless an arrangement [for payment of Defendants' fees] along the lines proposed in this letter come about on an immediate basis." (Ex. 62.)

RESPONSE:

Defendants object to Paragraph 50 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 50 because the allegations therein all relate to the merits of the case, about which discovery has not been taken.

51. On September 15, 2003, Franco confirmed his receipt of Given's memo to Politan. Franco also stated that a process server had been to his house and that he would notify Given as soon as he was served. (Ex. 63.)

RESPONSE:

Defendants object to Paragraph 51 because it fails to comply with Local Rule 56.1, as follows because the facts asserted therein are not material to the resolution of the Unclean Hands Motion. Defendants object to Paragraph 51 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 51 because: (1) it relies on Exhibit 63, which is inadmissible hearsay and has not been authenticated; and (2) Exhibit 63 does not contain a memo attachment, so there is no evidence of the contents of any memo therein.

52. During his citation deposition, Franco stated, "[w]e could not set foot -- couldn't set foot in a California Court for legal reasons, and Ron can explain that..." (Ex. 64.)

RESPONSE:

Defendants object to Paragraph 52 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 52 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 52 because: (1) it relies on Exhibit 64, which is inadmissible hearsay and has not been authenticated by the court reporter; and (2) the cited exhibit speaks for itself and Plaintiff's quotation of it is inaccurate and misleading. Without waiving the foregoing objections, Defendants add that the purported transcript of Franco's citation deposition further states:

> One of you guys or both of you guys should pick up the phone, talk to Ron Given, talk lawyer to lawyer, and he will tell you what I am telling you. We could not set foot -- couldn't set foot in a California court for legal reasons, and Ron can explain that, and we have no attorney to represent ourselves. Otherwise, we would show up in court way back when, and then this matter would have been resolved, because it would have been established that there was no funding. Therefore, there wasn't a basis for Gerry's lawsuit, and that would have been that. (Resp. Ex. 64 at 57:4-14.)

Given Receives Notice of SC's TRO and Implements His Nine-Point Strategy, Which Will Culminate in the "Functional Equivalent" Deal

53. On September 16, 2003, Given received notice of SC's TRO. (Ex. 65.)

RESPONSE:

Defendants object to Paragraph 53 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 53 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants admit the allegations of Paragraph 53 solely for the purposes of the Unclean Hands Motion.

54. The next day, September 17, Given sent SC's TRO to CMGT's shareholders and Spehar. Consistent with his nine-point strategy, Given stated "Mayer Brown has not been retained to deal with this matter, and we do not expect to be." (Ex. 66.)

RESPONSE:

Defendants object to Paragraph 54 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited and; (3) it is argumentative. Defendants object to Paragraph 54 because the allegations therein all relate to the merits of the case, about which

discovery has not been taken. Without waiving the foregoing objections, Defendants admit, solely for the purposes of the Unclean Hands Motion, that on September 13, 2003, Given sent a copy of the TRO to CMGT's shareholders and Spehar, and, in an email to them, stated, "Mayer Brown has not been retained to deal with this matter, and we do not expect to be." Defendants dispute the allegation "[c]onsistent with his nine-point strategy" because there is no evidence that the so-called "nine-point strategy" was ever agreed to or implemented and it is not mentioned in the cited exhibit.

55. On September 18, 2003, Franco told Given "I'll talk with you in the AM about [SC's TRO]." (Ex. 67.)

RESPONSE:

Defendants object to Paragraph 55 because it fails to comply with Local Rule 56.1 because the facts asserted therein are not material to the resolution of the Unclean Hands Motion. Defendants object to Paragraph 55 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 55 because: (1) it relies on Exhibit 67, which is inadmissible hearsay and has not been authenticated; and (2) the cited exhibit does not support the allegation that Franco wanted to discuss Spehar's TRO, to the contrary, the cited email states, "This is from Gerry's Denver, CO lawyer and he's communicating directly with our shareholders. I think I know what Gerry is up to now and I'll talk with you in the AM about it." (Resp. Ex. 67 at 1.)

56. On September 19, 2003, Given implemented points one, three and four of his September 14 strategy. In that regard, Given sent CMGT's shareholders and Spehar an email, stating: (a) as a result of SC's TRO, Franco has advised Given that he must now plan to leave his position with CMGT and pursue other opportunities, (b) representatives of Newco have indicated that they intend to terminate the LOI in short order, (c) SC's claim is "absolutely

spurious" and its request for injunctive relief is "clearly inappropriate," (d) CMGT has no money to fight this battle, and (e) Franco and Given are going to "work on" the issue of CMGT not breaching its client contracts. Given invited CMGT's shareholders to call him with questions about SC's lawsuit, but he said nothing about the "functional equivalent" deal. (Ex. 68.)

RESPONSE:

Defendants object to Paragraph 56 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; (3) it contains multiple sentences and facts rather than a short statement of fact; and (4) it is argumentative. Defendants object to Paragraph 56 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute the allegations of Paragraph 56 because: (1) the cited exhibit speaks for itself and Plaintiff's summary of it is inaccurate and misleading; (2) there is no evidence that the so-called "September 14 strategy" was ever agreed to or implemented and it is not mentioned in the cited exhibit; (3) there is no evidence that the so-called "functional equivalent" deal or any other deal was agreed to or implemented and it is not mentioned in the cited exhibit; and (4) Ronald invited shareholders to contact him or Franco regarding the "current situation," not the Spehar Lawsuit.

57. SC's attorney responded to Given's September 19 email that same day. He stated, "Spehar Capital was forced to rely on the legal process to preserve its rights because CMGT and its counsel refused to substantively address Spehar Capital's claims, even though it knew of Spehar Capital's position and the potential for legal action." He also stated that there were many ways that CMGT could still close the Trautner Deal while protecting SC's rights, but that instead of pursuing those options, CMGT decided to "just pull the plug." (Ex. 69.)

RESPONSE:

Defendants object to Paragraph 57 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 57 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 57 because: (1) it relies on Exhibit 69, which is inadmissible hearsay and has not been authenticated; and (2) the cited exhibits do not support the allegation that "there were many ways that CMGT could still close the Trautner Deal while protecting SC's rights," to the contrary, Spehar's attorney purportedly stated that "there may be ways" to close the Trautner Deal "while still protecting Spehar Capital's rights" (Resp. Ex. 69 at 2 ¶10); (3) Franco testified that he made a settlement offer of $250,000 or so to Spehar, who rejected it (Franco Aff., Appendix Ex. B, ¶15); (4) Franco, Baliga and Wong believed that Spehar's settlement demands were unreasonable (Franco Aff., Appendix Ex. B, ¶¶14-16 & 43; Baliga Aff., Appendix Ex. C, ¶6; Wong Aff., Appendix Ex. E, ¶5); and (5) Spehar demanded to be "fully compensated" for the Trautner Deal which, to Spehar, included an extensive list of demands (Resp. Ex. 28 at 1 ¶7 (emphasis added); Resp. Ex. 39).

58. On September 19, 2003, Franco sent Given copies of two shareholder emails that he had received from an employee. (Ex. 70.) The shareholders expressed concern about the status of CMGT. One of those shareholders, John Ross ("Ross"), stated:

> I have no idea of what, if any, disputes or claims may exist which might delay and/or diminish the ultimate distribution to the rightful shareholders. Further, I have just received a faxed copy of a filing by Spehar Capital, LLC for a

> temporary restraining order against CMGT in connection with the Newco sale. It sounds as if this is going to be a difficult sale to consummate.

(*Id.* at p. 3.) Clearly, Ross was neither asked to contribute money to defend SC's TRO request nor told about Given's nine-point strategy and the fact that Given and Franco were implementing that strategy.

RESPONSE:

Defendants object to Paragraph 58 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citations contained therein are made to a multipage document generally rather than to a specific page of the document cited; (3) it contains multiple sentences and facts rather than a short statement of fact; and (4) it is argumentative. Defendants object to Paragraph 58 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 58 because: (1) it relies on Exhibit 70, which is inadmissible hearsay and has not been authenticated; (2) the cited exhibit does not support the allegations "Clearly, Ross was neither asked to contribute money to defend SC's TRO request nor told about Given's nine-point strategy and the fact that Given and Franco were implementing that strategy," which are not contained in Ross's email; (3) there is no evidence that the so-called "nine-point strategy" was agreed to or implemented and it is not mentioned in the cited exhibit; (4) Ross stated that he was "an unwilling 'investor' [in CMGT], to say the least" (Resp. Ex. 70 at 4 ¶1); (5) Franco testified that he asked all of CMGT's shareholders to contribute additional funds to defend the Spehar Lawsuit, but most of them rejected his request (Franco Aff., Appendix Ex. B, ¶42); and (6) Ross received other communications that Franco made to all of CMGT's shareholders (E.g. Resp. Ex. 11, 26 & 94).

59. On September 20, 2003, Baliga sent an email to Spehar, Franco and James Wong ("Wong"). Baliga encouraged them to settle SC's dispute. (Ex. 71.) Spehar stated that he remained willing to talk about solutions. (Ex. 72.) Franco forwarded that email exchange to Given. (Ex. 73.)

RESPONSE:

Defendants object to Paragraph 59 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) at least one citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 59 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 59 because: (1) it relies on Exhibits 71, 72 and 73 which are inadmissible hearsay and have not been authenticated; (2) the cited exhibit does not support the allegation that "Baliga encouraged [Spehar, Franco and Wong] to settle SC's dispute," to the contrary, in it Baliga purportedly "urge[d] everyone to focus effots not on current or potential future legal proceedings, but on proceedings that will solve CMGT's near term and long term funding issues," (Resp. Ex. 71); (3) the cited exhibits do not support the allegation that "Spehar stated that he remained willing to talk about solutions" in response to Baliga's email, to the contrary, Exhibit 72 does not contain the message to which Gerry was responding (Resp. Ex. 72); (4) Exhibit 73 does not support the allegation that "Franco forwarded that email exchange to Given," as Exhibit 73 attaches the purported email from Baliga (i.e. Exhibit 71), but does not attach the purported email in which Gerry allegedly stated that "he remained willing to talk about solutions" (i.e. Exhibit 72); (5) Franco testified that he made a settlement offer of $250,000 or so to Spehar, who rejected it (Franco Aff., Appendix Ex. B, ¶15); (6) Franco, Baliga and Wong believed that

Spehar's settlement demands were unreasonable (Franco Aff., Appendix Ex. B, ¶¶14-16 & 43; Baliga Aff., Appendix Ex. C, ¶6; Wong Aff., Appendix Ex. E, ¶5); and (7) Spehar demanded to be "fully compensated" for the Trautner Deal which, to Spehar, included an extensive list of demands (Resp. Ex. 28 at 1 ¶7 (emphasis added); Resp. Ex. 39). Without waiving the foregoing objections, Defendants add that Baliga purportedly stated, "As you are aware, I have been the principal source of funds for CMGT the past year. Based on recent developments, I cannot continue in that position" and that "I cannot commit further funding to CMGT." (Resp. Ex. 71 at 1.)

Trautner's Investment Group Pays Defendants $50,000, and Given's "Functional Equivalent" Deal Moves Full Steam Ahead

60. On September 21, 2003, Politan sent Given the letter that he had requested in his September 14 memo (*see* Ex. 62) regarding payment of Defendants' fees. Politan's letter did not say anything about the Trautner LOI being terminated. Politan enclosed a $50,000 check payable to Defendants. (Ex. 74.)

RESPONSE:

Defendants object to Paragraph 60 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citations contained therein are made to multipage documents generally rather than to a specific page of the documents cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 60 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 60 because it relies on Exhibit 74, which is inadmissible hearsay and has not been authenticated.

61. The next day, September 22, Franco sent Given several "to do" lists that were prepared by Trautner's representative, Bentz. Bentz's lists, which are dated September 20, 2003, reveal

Given and Franco moving forward with Given's "functional equivalent" deal. They also reveal that Newco's name would be "First In Touch." Finally, these lists reveal that Wong knew about and was participating in Given's "functional equivalent" deal. (Ex. 75.)

RESPONSE:

Defendants object to Paragraph 61 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; (3) it contains multiple sentences and facts rather than a short statement of fact; and (4) it is argumentative. Defendants object to Paragraph 61 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 61 because: (1) it relies on Exhibit 75, which is inadmissible hearsay and has not been authenticated; (2) the cited exhibit does not support the allegation that Bentz was "Trautner's representative;" and (3) there is no evidence that the so-called "functional equivalent" deal or any other deal was agreed to or implemented and it is not mentioned in the cited exhibit.

62. On October 1, 2003, Franco sent Given a fax attaching a notice from the DuPage County Clerk that a decree/judgment had been entered against CMGT and in favor of SC. Franco asked Given, "[d]o we need/want to do anything in DuPage County?" (Ex. 76.)

RESPONSE:

Defendants object to Paragraph 62 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 62 because the allegations therein all relate to the merits of the case, about which discovery has

not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 62 because it relies on Exhibit 76, which is inadmissible hearsay and has not been authenticated.

63. On October 2, 2003, Given sent CMGT's shareholders and Spehar an email. He stated that because SC had not withdrawn its lawsuit, Newco had terminated their [sic] LOI. (Ex. 77.)

RESPONSE:

Defendants object to Paragraph 63 because it fails to comply with Local Rule 56.1 because the facts asserted therein are not material to the resolution of the Unclean Hands Motion. Defendants object to Paragraph 63 because the allegations therein all relate to the merits of the case, about which discovery has not been taken.

64. On October 3, 2003, SC's attorney responded to Given's email. He stated that SC disagreed with many of Given's statements, but that instead of dwelling on such differences, SC would rather join CMGT's investors in trying to salvage a deal that worked for all parties. (Ex. 78.)

RESPONSE:

Defendants object to Paragraph 64 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 64 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 64 because: (1) it relies on Exhibit 78, which is inadmissible hearsay and has not been authenticated; (2) Franco testified that he made a settlement offer of $250,000 or so to Spehar, who rejected it (Franco Aff., Appendix Ex. B, ¶15); (3) Franco, Baliga and Wong believed that Spehar's settlement demands were unreasonable (Franco Aff., Appendix Ex. B, ¶¶14-16 & 43;

Baliga Aff., Appendix Ex. C, ¶6; Wong Aff., Appendix Ex. E, ¶5); and (4) Spehar demanded to be "fully compensated" for the Trautner Deal which, to Spehar, included an extensive list of demands (Resp. Ex. 28 at 1 ¶7 (emphasis added); Resp. Ex. 39).

65. On October 3, 2003, Franco sent Given a typed version of Bentz's September 2, 2003 "to do" lists. (Ex. 79.)

RESPONSE:

Defendants object to Paragraph 65 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 65 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 65 because: (1) it relies on Exhibit 79, which is inadmissible hearsay and has not been authenticated; and (2) there is no evidence that Bentz was Trautner's representative.

66. Unaware of Given's "functional equivalent" deal with Trautner, Spehar sent an email to Franco, Given and Baliga regarding SC's continued efforts to resolve SC's contract dispute. Spehar asked Franco for the Trautner investment group's representative's contact information so that he could try to (a) bring them back to the table, and (b) resolve SC's contract dispute. (Ex. 80.) Franco forwarded Spehar's October 4, 2003 email to Bentz and stated, "Ron and I discussed this and we are not replying to Gerry's email as it is not necessary." (Ex. 81.)

RESPONSE:

Defendants object to Paragraph 66 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 66 because the allegations therein all relate to the merits of the

case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 66 because: (1) it relies on Exhibit 81, which is inadmissible hearsay and has not been authenticated; (2) the cited exhibits do not support the allegations that Spehar wanted to "bring [the Trautner group] back to the table" and/or "resolve [Spehar's] contract dispute," to the contrary, Exhibit 80 contains no such language; (3) there is no evidence that Bentz was Trautner's representative; (4) there is no evidence that the so-called "functional equivalent" deal or any other deal was agreed to or implemented and no such deal is mentioned in the cited exhibits; (5) Franco testified that he made a settlement offer of $250,000 or so to Spehar, who rejected it (Franco Aff., Appendix Ex. B, ¶15); (6) Franco, Baliga and Wong believed that Spehar's settlement demands were unreasonable (Franco Aff., Appendix Ex. B, ¶¶14-16 & 43; Baliga Aff., Appendix Ex. C, ¶6; Wong Aff., Appendix Ex. E, ¶5); and (7) Spehar demanded to be "fully compensated" for the Trautner Deal which, to Spehar, included an extensive list of demands (Resp. Ex. 28 at 1 ¶7 (emphasis added); Resp. Ex. 39).

67. On or about October 6, 2003, Given, Franco, Bentz and Trautner had a conference call to discuss "the many issues" before them, including SC's preliminary injunction and TRO. (Ex. 82.)

RESPONSE:

Defendants object to Paragraph 67 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; and (2) the citation contained therein is made to a multipage document generally rather than to a specific page of the document cited. Defendants object to Paragraph 67 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 67

because: (1) it relies on Exhibit 82, which is inadmissible hearsay and has not been authenticated; (2) there is no evidence that Bentz was Trautner's representative; and (3) the cited exhibits do not support the allegation that any conference call was actually held, to the contrary, Exhibit 82 indicates only that Franco was trying to schedule a conference call. (Ex. 82 at 1.)

68. By October 2003, the structure of Given's "functional equivalent" deal was in full swing. Instead of Trautner's investment group forming and owning Newco/First In Touch, the plan was to have an existing company, Keenan & Associates ("Keenan"), with whom CMGT had a pre-existing relationship, form First In Touch as its subsidiary. (*See* Ex. 83.) Keenan would then enter into an outsourcing agreement with CMGT to service CMGT's four existing clients. (*Id.* at 3.) That work would be done by First In Touch, which would have an Arizona-based call center called the "Arizona Call Center." (*Id.* at 4.)

RESPONSE:

Defendants object to Paragraph 68 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) it contains multiple sentences and facts rather than a short statement of fact; and (3) it is argumentative. Defendants object to Paragraph 68 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute the allegations of Paragraph 68 because: (1) there is no evidence that the so-called "functional equivalent" deal or any other deal was agreed to or implemented, to the contrary, the proposed deal with Keenan indicates that there was no such deal; and (2) the cited exhibit speaks for itself and Plaintiff's summary of it is inaccurate and misleading.

69. According to the draft deal documents, Trautner's investment group was to have funded CMGT's operating deficit from July 31, 2003 through the formation of First In Touch. (Ex. 83 at ¶1 & 7(a).) The draft documents gave Trautner's Arizona investment group an option to purchase an ownership interest in the Arizona Call Center. (*Id.* at ¶ 7.) The formula

for the purchase price was based on the difference between (a) the amount spent by Keenan with respect to First In Touch, and (b) the amount paid by Trautner's investment group to fund CMGT's operating deficit. (*Id.*) The deal documents also contemplated that Franco would be the President of both First In Touch and the Arizona Call Center. (*Id.* at ¶¶, 5 & 8(d); *see also,* Ex. 84.) Franco also had an opportunity to become an owner of the Arizona Call Center. (Ex. 83 at ¶8(a).)

RESPONSE:

Defendants object to Paragraph 69 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) at least one citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 69 because the allegations therein all relate to the merits of the case, about which discovery has not been taken; and the phrase "draft deal documents" is vague and ambiguous. Without waiving the foregoing objections, Defendants dispute Paragraph 69 because: (1) it relies on Exhibit 84, which is inadmissible hearsay and has not been authenticated; and (2) the cited exhibit speaks for itself and Plaintiff's summary of it is inaccurate and misleading

Given Advises Franco About SC's Lawsuit and How to Respond to Shareholder Inquires Regarding CMGT's Status

70. On November 28, 2003, Franco sent Given an email regarding SC's lawsuit. Franco attached a copy of SC's amended complaint. He told Given that he wanted to discuss the amended complaint and "what Gerry & his lawyers are up to." (Ex. 85.) Given responded the next day. He stated, "I have it. We'll talk later." (Ex. 86.) On November 30, 2003, Franco sent additional documents relating to SC's lawsuit to Given so that they could discuss them. (Ex. 87.)

RESPONSE:

Defendants object to Paragraph 70 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands

Motion; (2) at least one citation contained therein is made to a multipage document generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 70 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 70 because it relies on Exhibits 85 and 87, which are inadmissible hearsay and have not been authenticated.

71. On January 12, 2004, Franco sent Given and Wong an email regarding SC's request for a default judgment. (Ex. 88.) Franco stated that he would call Given to discuss SC's request. (*Id.*) Given told Franco to call anytime after noon on January 15. (Ex. 89.) On January 30, 2004, Franco sent Given an email regarding the status of SC's lawsuit. (Ex. 90.) Franco continued to seek Given's advice regarding SC's lawsuit even after SC obtained its default judgment. (*E.g.*, Ex. 91.)

RESPONSE:

Defendants object to Paragraph 71 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) certain citations contained therein are made to multipage documents generally rather than to a specific page of the document cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 71 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 71 because: (1) it relies on Exhibits 88, 90 and 91, which are inadmissible hearsay and have not been authenticated; (2) the cited exhibits do not support the allegation that the call mentioned by Ronald in Exhibit 89 was connected Exhibit 88, the purported email from Franco; (3) the cited exhibits do not support the allegations that "Franco continued to seek Given's advice regarding SC's lawsuit even after SC obtained its default judgment," to the contrary, the communications

cited indicate only that such matters would be "discussed" and the content of these discussions -- whether legal counsel or otherwise -- is not in evidence; and (4) Franco, Baliga and Wong testified that they sought -- and in some cases interviewed -- attorneys (other than Defendants) in California and Chicago to represent CMGT in the Spehar Lawsuit. (Franco Aff., Appendix Ex. B, ¶¶ 42; Baliga Aff., Appendix Ex. C, ¶9; Quarles Aff., Appendix Ex. D, ¶4; Wong Aff., Appendix Ex. E, ¶¶9-10.)

72. In March, 2004, Franco and Given began receiving emails from or on behalf of CMGT shareholders inquiring about the status of CMGT. (Ex. 92.) One such email stated, "[i]s CMGT still active? We have heard nothing since being advised of the Spehar injunction ... Please fulfill your obligation to respond." (*Id.* at p. 4.) Franco asked Given how to respond. (*Id.* at p. 2.) Given told Franco to "send your note out to everyone regarding the LA lawsuit. I wouldn't bother with them [the CMGT shareholders] anymore than that." (*Id.* at p. 1.)

RESPONSE:

Defendants object to Paragraph 72 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) it contains multiple sentences and facts rather than a short statement of fact; and (3) it is argumentative. Defendants object to Paragraph 72 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 72 because: (1) it relies on Exhibit 92, which is inadmissible hearsay, in part, and has not been authenticated, in part; (2) the cited exhibit speaks for itself and Plaintiff's summary of it is inaccurate and misleading; and (3) the cited exhibit does not support the allegation that "Franco and Given began receiving emails from or on behalf of CMGT shareholders." Without waiving the foregoing objections, Defendants add that the purported email to Franco more fully stated, "Is CMGT still active? We have heard nothing since being advised of the Spehar injunction. I must advise my father

whether or not his investment is a loss. Please fulfill your obligation to respond. Thank you." (Resp. Ex. 92 at 4.)

73. Pursuant to that advice, Franco sent CMGT's shareholders an email, which was pre-approved by Given. In part, that email stated, "[a]s Ronald B. Given of Mayer Brown Rowe & Maw indicated to you in his e-mail dated September 19, 2003, I have resigned as President and CEO of' CMGT, Inc. and no longer have any employment relationship with the company." (Ex. 93 and Ex. 94.) Franco later testified, in a citation deposition, that he officially resigned on September 19, 2003. (Ex. 64 at p. 59.)

RESPONSE:

Defendants object to Paragraph 73 because it fails to comply with Local Rule 56.1, as follows: (1) the facts asserted therein are not material to the resolution of the Unclean Hands Motion; (2) certain citations contained therein are made to a multipage documents generally rather than to a specific page of the documents cited; and (3) it contains multiple sentences and facts rather than a short statement of fact. Defendants object to Paragraph 73 because the allegations therein all relate to the merits of the case, about which discovery has not been taken. Without waiving the foregoing objections, Defendants dispute Paragraph 73 because: (1) it relies on Exhibits 64, 93 and 94, which are inadmissible hearsay and have not been authenticated; (2) there is no evidence that the Franco's purported email (Resp. Exs. 93 & 94) was connected in any way to the purported "advice" described in Paragraph 72; and (3) the cited exhibits do not support the allegation that Franco's email "was pre-approved by Given," to the contrary, Exhibit 93 indicates only that a draft letter was sent to Ronald. (Resp. Ex. 93.)

Respectfully submitted by,

MAYER BROWN LLP and RONALD B. GIVEN

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CERTIFICATE OF SERVICE

Stephen Novack, an attorney, hereby certifies that he caused a true and correct copy of the foregoing Reply to Plaintiff's Rule 56.1(b)(3)(C) Statement in Support of His Response to Defendants' Motion for Summary Judgment to be served through the ECF system upon the following:

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on this 19th day of August, 2009.

/s/ Stephen Novack